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In the Supreme Court of the United States

OCTOBER TERM, 1965

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No. 1206

WALTER JOHNSON, individually and as Secretary-Treasurer of Department Store Employees Union, Local 1100, an unincorporated association, on behalf of himself and all its members, and WILLIAM SILVERSTEIN, individually and as Secretary-Treasurer of Retail Shoe & Textile Salesmen's Union, Local 410, an unincorporated association, on behalf of himself and all its members,

Petitioners,

vs.

RAPHAEL WEILL & Co., INC., d/b/a THE WHITE HOUSE, et al.; JOHN M. ENGLAND, C. E. STROBEL, and WALTER J. HEMPY, as Trustees in Bankruptcy of RAPHAEL WEILL & Co., INC.,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari

To the United States Court of Appeals for the Ninth Circuit

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To the United States Court of Appeals for the Ninth Circuit

Respondents, C. E. STROBEL, WALTER J. HEMPY and JOHN M. ENGLAND, as trustees in Bankruptcy of Raphael Weill & Co., Inc., pray that the Supreme Court deny the petition

on file herein for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit entered in the above cause January 12, 1966.

QUESTIONS PRESENTED

1. Is a suit commenced in a state Court for enforcement of an agreement to arbitrate between a labor union and an employer in an industry affecting commerce removable to a federal District Court, when all jurisdictional facts necessary to make Section 301(a) of the National Labor Relations Act, as amended (61 Stat. 156, (1947), 29 U.S.C. § 185 (1952)), applicable appear in the state Court proceedings prior to the expiration of the period for removal as set forth in 28 U.S.C. § 1446(b)?

2. Is the Bankruptcy Court, pursuant to the exclusive jurisdiction granted it by Section 2 of the Bankruptcy Act (36 Stat. 838 (1910), as amended, 11 U.S.C. § 11 (1952)) the proper forum for the determination of a claim of a labor union against the estate of a bankrupt corporation?

STATUTES INVOLVED

In addition to the statutes involved as shown on page 3 of the Petition, the following statutes are also relevant:

Section 1446(b) of Title 28 U.S.C.

Section 26 of the Bankruptcy Act (52 Stat. 855 (1938), 11 U.S.C. § 49 (1952)).

Section 57(d) of the Bankruptcy Act (52 Stat. 866 (1938) 11 U.S.C. § 93(d) (1952)).

The full text of said sections is printed in Appendix A hereto.

STATEMENT

On January 27, 1965, petitioners, on behalf of themselves and all members of certain unions, commenced an action in the Superior Court in and for the City and

County of San Francisco, State of California (hereinafter referred to as the "State Superior Court") to compel Raphael Weill & Co., Inc., d/b/a The White House (hereinafter referred to as the "bankrupt") to arbitrate certain alleged grievances pursuant to the terms of a collective bargaining agreement. (R. Vol. 1, p. 4.) The State Superior Court issued an order to show cause why such relief should not be granted and a temporary restraining order prohibiting the bankrupt from dissipating or otherwise transferring its assets below the sum of $158,000 pending a hearing on the State Superior Court's order to show cause. (R. Vol. 1, p. 19.)

On February 3, 1965, the bankrupt filed a voluntary petition in bankruptcy in the United States District Court, for the Northern District of California, Southern Division (hereinafter referred to as the "District Court") and was duly adjudicated a bankrupt. C. E. Strobel was appointed as receiver for the bankrupt on the same date.

On February 8, 1965, the District Court entered its order in the bankruptcy proceedings enjoining and restraining further prosecution of suits against the bankrupt. At a hearing held before the State Superior Court on the following date, the full text of said order was read into the record. (R. Vol. 4, p. 4.) Despite the clear terms of said order, counsel for petitioners continued to prosecute this action.

A further hearing was held on February 10, 1965, at which hearing the attorney for the receiver made a special appearance to object to the jurisdiction of the State Superior Court. (R. Vol. 4, p. 22.) Ultimately, on February 11, 1965, the State Superior Court entered an order directing arbitration and requiring the bankrupt to deposit in the State Superior Court the sum of $158,000 pending the arbitration award or further order of said State Superior Court. (R. Vol. 4, p. 43.)

Respondents were not elected as trustees in bankruptcy of the bankrupt until February 24, 1965, and were neither parties to nor participated in any way in the State Superior Court proceedings above referred to.

On February 11, 1965, attorneys for the bankrupt filed a petition for removal of the cause to the District Court under the provisions of 28 U.S.C. §§ 1441 and 1446. (R. Vol. 1, p. 1.) The petition alleged that the bankrupt was engaged in interstate commerce and that the matter was, therefore, within the original jurisdiction of the District Court pursuant to the provisions of § 301(a) of the National Labor Relations Act, as amended (61 Stat. 156 (1947), 29 U.S.C. § 185(a)(1952)).

On February 17, 1965, petitioners filed a motion to remand pursuant to the provisions of 28 U.S.C. § 1447(c). (R. Vol. 1, p. 60.) Said motion was denied on March 11, 1965. (R. Vol. 1, p. 86.) Respondents moved to dissolve the order of the State Superior Court compelling the bankrupt to submit to arbitration and requiring the deposit in said State Superior Court of the sum of $158,000. (R. Vol. 1, p. 34.) On March 16, 1965, the District Court granted respondents' motion and on March 23, 1965, the District Court entered an order dissolving the State Superior Court's orders. (R. Vol. 1, p. 131.)

The Court of Appeals for the Ninth Circuit in affirming the District Court's denial of remand found the case properly removable as one arising under the laws of the United States, to-wit, § 301(a) of the National Labor Relations Act, as amended (61 Stat. 156 (1947), 29 U.S.C. § 185 (a) (1952)). (Petition, Appendix A, p. 9.) The Ninth Circuit also found that the provisions of the Bankruptcy Act relating to liquidation of contingent and unliquidated claims applied to the union claims in this case. (Petition, Appendix A, p. 17.)

REASONS FOR DENIAL OF WRIT

1. The Right of Respondents to Remove This Cause to the District Court Was Clear, Involves No Question of Interpretation of Either § 301(a) or the Removal Statute Which Needs to Be Decided by the Supreme Court, and Does Not Disturb the Concurrent Jurisdiction of the State Courts in § 301(a) Cases.

Petitioners misconstrue the decision of the Court below concerning the issue of removal. In their petition, petitioners make the following statements:

> "To say, as does the Court of Appeals, that § 301 preempts this field of law so as to make a suit for violation of a collective bargaining agreement brought in a state Court always removable to a federal Court is to say that the federal Court has *exclusive* jurisdiction, as opposed to concurrent jurisdiction with the state Courts. . . .
>
> ". . . There can be little question, in the light of its erroneous pre-emption rationale, that the holding of the Court of Appeals for the Ninth Circuit, if allowed to stand, has the effect of granting to the federal Courts *exclusive* jurisdiction over all suits for enforcement of collective bargaining agreements in industries affecting commerce." (Petition, p. 12.)

If the Court below had ruled, as petitioners claim, that § 301(a) vests exclusive jurisdiction in the federal Courts, such ruling would, of course, be contrary to the holding of the Supreme Court in *Dowd Box v. Courtney*, 368 U.S. 502 (1962). Furthermore, if the federal Courts had exclusive jurisdiction of this case, removal would have been improper. See *Lambert Run Coal Co. v. Baltimore & Ohio R. Co.*, 258 U.S. 377 (1922).

The decision of the Court below was not based upon the reasoning that petitioners claim but rather on the reasoning that § 301(a) established true federal question jurisdiction and that a suit under § 301(a) is one arising

under the laws of the United States and is therefore removable. This decision is consistent with the holdings in *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448 (1957), and *Teamsters' Union v. Lucas Flour Co.,* 369 U.S. 95 (1962), that federal substantive law applies in § 301(a) cases and that § 301(a) does more than merely vest jurisdiction in the federal courts to hear certain categories of labor disputes.

Nor does the decision of the Court below disturb the concurrent jurisdiction of the state Courts. Petitioners confuse the concept of "jurisdiction" with the concept of "pre-emption". The term "pre-emption", as it applies to this case, refers to areas where federal substantive law has superseded state substantive law. The Supreme Court in *Lucas Flour,* held that federal substantive law supersedes state substantive law in cases involving disputes between a union and an employer in an industry affecting commerce, and in *Dowd Box,* that the state courts have concurrent jurisdiction in such cases. These two decisions establish that (1) there is no state cause of action for breach of a collective bargaining agreement where an employer is in an industry affecting interstate commerce and (2) that a suit to enforce such an agreement under federal law may be brought in the state courts. See *Retail Clerks Union v. Thriftimart, Inc.,* 59 C.2d 421, 380 P.2d 652 (1963). Since no state cause of action exists under the facts of this case, the right of a plaintiff to choose between a state-created and a federally-created cause of action does not exist and cases such as *Henry v. A. B. Dick Co.,* 224 U.S. 1 (1912) and *The Fair v. Kohler Die & Specialty Co.,* 228 U.S. 22 (1913) are not applicable. Although such suits may be brought in a state Court, they are clearly removable since such cases are ones over which the federal courts had original (although concurrent) jurisdiction. *Fay*

v. American Cystoscope Makers, 98 F. Supp. 278 (S.D.N.Y. 1951)

Cases such as *Gully v. First National Bank in Meridian,* 299 U.S. 109 (1936), and *Pan American Petroleum Corp. v. Superior Court of Delaware,* 366 U.S. 656 (1961), cited by petitioners, announcing the general rule that a case is removable only if the construction of a federal law or the constitution of the United States is directly put in issue by the plaintiff, do not aid petitioners for two reasons.

The general rule as set forth in *Gully* and *Pan American* has been held inapplicable where the only federal element missing from the plaintiff's complaint consists of the status of one of the parties. *Davenport v. Procter & Gamble Mfg. Co.,* 241 F.2d 511 (2nd Cir. 1957); *Minkoff v. Scranton Frocks, Inc.,* 172 F. Supp. 870 (S.D.N.Y. 1959). If such an exception were not made to the general rule, then in many instances a plaintiff could deprive a defendant of his right to remove by improper pleading. *Fay v. American Cystoscope Makers, supra.* In the instant case, petitioners' pleading in the State Superior Court shows all the necessary elements for an action under § 301 except that the pleading did not allege that the bankrupt was an employer in an industry affecting commerce. It is proper to look to the allegations of the petition for removal to ascertain whether the employer is in an industry affecting commerce. *Minkoff v. Scranton Frocks, Inc., supra; Fay v. American Cystoscope Makers, supra;* See, also, *Table Talk Pies of Westchester v. Strauss,* 237 F. Supp. 514 (S.D.N.Y. 1964) (involved § 303(a) of the National Labor Relations Act, as amended 61 Stat. 158 (1947), as amended 73 Stat. 545 (1959), 29 U.S.C. § 187). The petition for removal in this case alleged that the bankrupt was in an industry affecting commerce and such allegations have never been challenged by petitioners.

Gully and *Pan American* are also inapplicable because the necessary elements of an action under § 301(a) were presented in the State Superior Court in this case prior to its removal. The Removal Statute allows removal within twenty days after the filing of plaintiff's complaint or within twenty days after the filing by the plaintiff of some other paper first disclosing the federal question involved. 28 U.S.C. § 1446(b). Such "other paper" can consist of oral testimony so long as the same is a part of the record of the proceedings in the state court. *Fisher v. United Airlines*, 218 F. Supp. 223 (S.D.N.Y. 1963); *Bonnell v. Seaboard Air Line R.R. Co.*, 202 F. Supp. 53 (N.D. Fla. 1962); *Gilardi v. Atchison, Topeka & Santa Fe Ry. Co.*, 189 F. Supp. 82 (N.D. Ill. 1960).

During the hearings conducted in the State Superior Court on February 9 and 10, 1965, counsel for petitioners asserted for the first time that petitioners' action was based upon the National Labor Relations Act:

> "Mr. Davis: In any event, I advised him (United States District Judge Zirpoli) of our position that in view of the proceedings of the National Labor Relations Act, I had asked this Court to continue these proceedings so that I could file a memorandum to establish to this Court's satisfaction that the National Labor Relations Act provisions prevailed over the Bankruptcy Act, and that you could proceed . . . ." (R. Vol. 4, p. 6.)
>
> "Mr. Davis: Yes, Your Honor. As I explained it at the hearing yesterday, as to which this is a continued hearing, in our view, section 15 of the National Labor Relations Act is the basis for this Court's paramount jurisdiction over the Referee in Bankruptcy in a matter such as this, and this matter is a matter which arises under a collective bargaining contract between an employer of the union which are subject to the terms of the National Labor Relations Act, and section 301 of

that Act provides, and the United States Supreme Court has so held, that the Courts, both the state courts and the federal District courts, have jurisdiction to require the parties to a collective bargaining contract to arbitrate the controversy arising under that contract where the contract provides for arbitration, as we say it does here." (R. Vol. 4, pp. 14-15.) (See also R. Vol. 4, p. 7.)

These voluntary statements of petitioners made prior to the filing of the petition for removal disclose the federal question involved and allow removal to the District Court under the rule of the cases above cited and 28 U.S.C. § 1446(b).

Petitioners claim that the decision of the Ninth Circuit in this case "has come into apparent conflict" with the decision of the Third Circuit in *American Dredging Co. v. Local 25, Marine Div., I.U.O.E.*, 338 F.2d 837 (3rd Cir. 1964), *cert. denied*, 380 U.S. 935 (1965). No conflict exists. In *American Dredging*, the plaintiff employer sought a state Court injunction against a union based upon a "no-strike" clause in a collective bargaining agreement. The defendant union removed the action to the federal District Court. The Third Circuit ordered the case remanded to the state Court holding that the Norris-LaGuardia Act deprived the federal District Court of jurisdiction. The issue presented by the Norris-LaGuardia Act is clearly not present in or applicable to this case. The Third Circuit also stated, citing, *Gully, Pan American* and similar cases, that the action was not removable since it could not be ascertained from plaintiff's complaint in the state court that plaintiff was in an industry affecting commerce. The court nowhere, however, discussed the status exception to the rule of *Gully*, nor is there any indication from the opinion of the Court that the plaintiff therein orally volunteered that it relied on federal law.

Removal clearly was proper in the present case, and no issue is presented for decision by the Supreme Court on this point. It is also apparent that petitioners' claim that there is a conflict in decisions of the United States Courts of Appeals is erroneous.

2. Neither the National Labor Relations Act, as Amended, Nor National Labor Policy Requires the Bankruptcy Court to Surrender the Exclusive Jurisdiction Vested in It by Section 2 of the Bankruptcy Act to Determine the Union Claims Herein Involved.

The facts in the instant case are strikingly similar to those presented in the case of *In the Matter of Muskegon Motors Specialties Co.*, 313 F.2d 841 (6th Cir.), *cert. denied*, 375 U.S. 832 (1963). In that case, the Sixth Circuit held (as was held by the Ninth Circuit in this case) that the liquidation of a union claim in bankruptcy proceedings was to be determined by the Bankruptcy Court, rather than pursuant to the terms of a collective bargaining agreement to which the other creditors of the bankrupt were not parties. There is no authority to the contrary.

Throughout their petition and in their briefs in the lower Court, petitioners rely on a "national labor policy" in favor of arbitration to avoid industrial strife. All cases cited by petitioners relate to situations where the employer or a successor is continuing in business and further industrial strife is, therefore, possible. *E.g., Republic Steel v. Maddox*, 379 U.S. 650 (1965) (employer shut down one plant but other plants remained in operation); *NLRB v. Coal Creek Co.*, 204 F.2d 579 (10th Cir. 1953) (business continued by receiver).

Once an employer has permanently ceased doing business, no further industrial strife is possible. Where an employer has been adjudicated a bankrupt, the sole question remain-

ing is the proper distribution of the bankrupt's assets among the bankrupt's creditors. This is clearly a matter for determination by the Bankruptcy Court. See, *Nathanson, Trustee v. NLRB*, 344 U.S. 25 (1952); *NLRB v. Coal Creek Co., supra.*

Petitioners claim they are being deprived of a contractual right to arbitrate the disputes here involved. They fail to recognize, however, that by reason of the intervening bankruptcy, parties other than those to the original collective bargaining agreement now have an interest in the resolution of the union claims. The bankrupt corporation can neither gain nor lose from the manner in which the union claims are determined. Only other creditors of the bankrupt stand to gain or lose. Section 57(d) of the Bankruptcy Act (52 Stat. 866 (1938), 11 U.S.C. § 93(d) (1952)) clearly sets forth the manner for the liquidation of these union claims in proceedings before the Referee in Bankruptcy where other creditors of the bankrupt may participate.

Respondents concede that the Bankruptcy Court will surrender its jurisdiction where other federal legislation clearly supersedes the Bankruptcy Act, e.g. *Anderson v. Bigelow, Receiver*, 130 F.2d 460 (9th Cir.), *cert. denied*, 317 U.S. 690 (1942) (involved Norris-LaGuardia Act, which provides that *no* Court of the United States may issue an injunction involving a labor dispute); *In re Spier Aircraft Corp.*, 137 F.2d 736 (3rd Cir. 1943), *cert. denied*, 321 U.S. 770 (1944) (involved priority of navy wartime regulations over the Bankruptcy Act); *Cullen v. Bowles*, 148 F.2d 621 (2nd Cir. 1945) (explicit provisions of the Emergency Price Control Act vested exclusive jurisdiction in the Emergency Court of Appeals); *Order of Railway Conductors v. Pitney*, 326 U.S. 561 (1946) (involved a dispute expressly within the jurisdiction of an adjustment board created by statute), but

no provision of the National Labor Relations Act, as amended, requires such a surrender of jurisdiction in this case. Section 301(a) of the National Labor Relations Act (61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1952)) relates to suits between a union and an "employer". Although a Trustee in Bankruptcy is defined as a "person" by § 2(1) of the National Labor Relations Act, as amended (61 Stat. 137 (1947), 29 U.S.C. § 152(1) (1952)), such trustee is not defined as an "employer" in Section 2(2) of the same Act (61 Stat. 137 (1947), 29 U.S.C. § 152(2)(1952)). The Trustees in Bankruptcy in this case had no employees and were not engaged in business and, therefore, it appears clear that such trustees are not employers. Nor are such trustees "agents" for an "employer" since a Trustee in Bankruptcy is vested with title to the bankrupt's assets pursuant to § 70(a) of the Bankruptcy Act (52 Stat. 879 (1938), as amended, 66 Stat. 429 (1952), 11 U.S.C. § 110(a)(1952)) and is a successor to the bankrupt and not an agent for the bankrupt.

Petitioners also rely on Section 26 of the Bankruptcy Act (52 Stat. 855 (1938), 11 U.S.C. § 49 (1952)) which allows the Referee in Bankruptcy in his discretion to refer matters to arbitration. Where an arbitration is ordered by a Referee pursuant to Section 26, he retains control over the subject matter. The Referee could not retain control if arbitration were forced upon the trustees in this case. Furthermore, the scope of review from arbitration under Section 301(a) would be extremely limited. See *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 at 582-83 (1960).

In view of the foregoing and particularly the agreement of two United States Courts of Appeal, and the lack of a conflicting rule, it would appear that a writ for certiorari should not be granted by the Supreme Court in this case.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

Dated, San Francisco, California, May 10, 1966.

Respectfully submitted,

JOHN WALTON DINKELSPIEL,
Attorney for Respondents, John M. England, C. E. Strobel, and Walter J. Hempy, as Trustees in Bankruptcy of Raphael Weill & Co., Inc.

DINKELSPIEL & DINKELSPIEL
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Of Counsel

(Appendix A Follows)

Appendix A

PERTINENT STATUTES

Removal Statute 28 U.S.C. § 1446(b).

Section 1446(b)

"(b) The petition for removal of a civil action or proceeding shall be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

"If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable."

Bankruptcy Act Section 26 (52 Stat. 855 (1938), 11 U.S.C. § 49 (1952)).

"Section 49. *Arbitration of controversies*

"(a) The receiver or trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate.

"(b) Three arbitrators shall be chosen by mutual consent, or one by the receiver or trustee, one by the other party to the controversy, and the third by the two so chosen or, if they fail to agree in five days after their appointment, the court shall appoint the third arbitrator.

"(c) The written finding of the arbitrators or of a majority of them as to the issues presented may be filed in court and shall have like force and effect as the verdict of a jury."

Bankruptcy Act Section 57(d) (52 Stat. 866 (1938), 11 U.S.C § 93(d)(1952)).

"(d) Claims which have been duly proved shall be allowed upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest or unless their consideration be continued for cause by the court upon its own motion: *Provided, however,* That an unliquidated or contingent claim shall not be allowed unless liquidated or the amount thereof estimated in the manner and within the time directed by the court; and such claim shall not be allowed if the court shall determine that it is not capable of liquidation or of reasonable estimation or that such liquidation or estimation would unduly delay the administration of the estate or any proceeding under this title."